



**Legal Opinion L-2003-08**  
**July 7, 2003**

U.S. Railroad Retirement Board Phone: (312) 751-7139  
844 North Rush Street TTY: (312) 751-4701  
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

**TO** : V. M. Speakman, Jr.  
Labor Member

**FROM** : Steven A. Bartholow  
General Counsel

**SUBJECT** : Burlington Northern and Santa Fe Voluntary Reserve Board Program  
Compensation – Separation Allowance

This is in response to your request that I review the provisions of Burlington Northern and Santa Fe Voluntary Reserve Board Program, to determine the effect of payments under this plan under the Railroad Retirement and Railroad Unemployment Insurance Acts. As explained below, in my opinion, payments made under the Program are creditable as railroad compensation for benefit entitlement purposes under the Acts for months through the month in which the employee's resignation takes effect.

According to a summary of the Program which the General Director, Labor Relations, of the Burlington Northern and Santa Fe Railway (BNSF) provided to "all active clerical protected employees working at Topeka, Kansas", an eligible employee may file an election to be placed on a "Voluntary Reserve Board". The employee will be paid \$2,500 per month for a period of three years, except that payments end before expiration of three years if the employee becomes eligible for a full annuity under the Railroad Retirement Act. During the period of payment, the employee retains health insurance coverage, and the employee remains subject to recall. The BNSF will withhold health insurance premiums, union dues, and employment taxes under the Railroad Retirement Tax Act. The employee agrees to not reapply for any position at BNSF while on the Reserve Board, nor to perform service for BNSF in any capacity other than recall to service. The employee also agrees while on the Reserve Board to keep a current telephone number and address on file with the BNSF Manager of Labor Relations. The employee's resignation becomes effective at conclusion of the payments.

A second alternative offers employees eligible for the Reserve Board to elect immediate resignation and payment of a lump sum equal to \$2,500 per month multiplied by the number of months in what would otherwise be the employee's maximum period of Reserve Board eligibility (i.e., the lesser of 36 months or the number of months through eligibility for full retirement) for a gross lump sum not to exceed \$90,000. The employer will deduct "federal, state and railroad retirement taxes, and union dues, etc." but employees electing the lump sum are not subject to recall, and are not eligible for continuing health and welfare benefits or for 401(k) contributions. The election form for the lump sum alternative includes a statement that "I hereby agree to terminate my employment relationship and all of my employment rights with BNSF and its affiliates effective \_\_\_\_\_."

Section 1(h)(1) of the Railroad Retirement Act (RRA) defines compensation for benefit entitlement purposes under that Act in part as:

\* \* \* any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad] employers \* \* \* including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. \* \* \*



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Section 1(h)(2) of the RRA further provides that:

An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. \* \* \*

Section 1(i)(1) of the Railroad Unemployment Insurance Act provides essentially the same definition with respect to compensation creditable for benefit entitlement purposes under that Act as well. In addition, regulations of the Board (20 CFR 211.9, 211.10) provide:

§211.9 Dismissal allowance.

Dismissal allowances paid to an employee under a protective labor agreement that covers the amounts paid for specific periods of time are creditable as compensation under the Railroad Retirement Act, provided the employee has not severed his or her employment relationship.

§211.10 Separation allowance or severance pay.

Separation or severance payments are creditable compensation except that no part of such payment shall be considered creditable compensation to any period after the employee has severed his or her employer-employee relationship, except as provided for in §211.11 of this part [which allows a payment taxable only for tier I purposes under the Railroad Retirement Tax Act to be credited for purposes of calculating the tier I annuity component under the RRA pursuant to section 1(h)(8) of that Act].

In Legal Opinion L-94-8, this Office reviewed an agreement between an employer and the collective bargaining representative of its employees which allowed the employees to elect assignment to a reserve board in lieu of resignation and payment of a lump sum payment. An employee on the reserve board remained subject to recall by the employer. The agreement allowed the employee to determine the number of months he or she would remain on the reserve board. During this time the lump sum the employee would otherwise have received would be apportioned in equal parts to each month the employee remained on the reserve board. Legal Opinion L-94-8 determined that the payments to the employees remained creditable railroad compensation under the Acts during the time the employees remained on the reserve board. The lump sum paid to those who resigned immediately, however, was creditable only through the date of resignation, except for tier I benefit purposes as provided by RRA section 1(h)(8) and section 211.11 of the Board's regulations.

The provisions of Burlington Northern and Santa Fe Voluntary Reserve Board Program do not differ in any material respect from those of the agreement considered by Legal Opinion L-94-8. Accordingly, it is my opinion that payments made to employees electing placement on the voluntary reserve board are creditable as compensation for benefit entitlement purposes under the RRA and RUIA, including calculation of the tier II annuity component, during the period the employee remains on the reserve board. The lump sum payment made under the Program to those who elect immediate resignation is creditable only through the date of resignation, except with respect to the tier I annuity calculation.<sup>1</sup>

I trust that the foregoing will be of assistance to you.

cc: Chief, Employer Service/Training Center

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<sup>1</sup> I may note that although the lump sum payment is not creditable as compensation from railroad service after the employee's resignation, this payment nevertheless disqualifies the employee from eligibility for unemployment or sickness insurance benefits for the period of time calculated pursuant to section 4(a-1)(iii) of the RUIA.



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Office of Assessment and Training

Director of Policy and Systems  
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